United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/affidavit

75-4096

To be argued by
MARY P. MAGUIRE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-4096

JUANA ESTELA CORNIEL-RODRIGUEZ,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

THOMAS J. CAHILL,
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CASES CITED

STATEMENT OF THE ISSUES

1. Whether the Board of Immigration Appeals erred in finding petitioner deportable as an alien who was excludable at time of entry for lack of a valid labor certification.

2. Whether the Immigration and Naturalization Service is estopped from deporting petitioner.

STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a), Juana Corniel-Rodriguez petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on April 3, 1975. That order dismissed petitioner's appeal from an order of an Immigration Judge which found Corniel-Rodriguez deportable under Section 241(a)(1) of the Act, 8 U.S.C. §1251(a)(1), denied her application to terminate the deportation proceedings and granted her the privilege of voluntary departure.

Corniel-Rodriguez had entered the United States on the basis of an immigrant visa issued to her as the "child" of a resident alien. However, after obtaining the visa, but before her entry into the United States, Corniel-Rodriguez had married and was therefore no longer a "child" within the meaning of the statute.* Petitioner contends that the United States consul who

*The child of a lawful permanent resident alien is exempt from the labor certification requirement of Section 212(a)(14) of the Act, 8 U.S.C. §1182(a)(14). In order to qualify as a "child", the applicant must be unmarried and under the age of twenty-one. Section 101(b)(1) of the Act, 8 U.S.C. §1101(6)(1).

issued her the visa did not advise her of the immigration consequences of marriage prior to entry and that the Board erred in refusing to terminate the deportation proceedings on the ground that the Immigration and Naturalization Service (the "Service") should be estopped from deporting petitioner in view of the alleged failure of the Consular officer to warn petitioner about the consequences of marriage prior to entry.

This Court has jurisdiction pursuant to the provisions of Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a(a).

STATEMENT OF THE FACTS

Petitioner Juana Corniel-Rodriguez is a 27 year old alien, a native and citizen of the Dominican Republic. On August 17, 1967 she applied for an immigrant visa at the United States Consulate in Santo Domingo, Dominican Republic, as the minor, unmarried "child" of a lawful permanent resident alien. Her application was approved and the consul issued her the visa on that date.

On September 23, 1967 petitioner married Evelio Rafael Marmolejo at Santiago, Dominican Republic. Three days later, on September 26, 1967 petitioner travelled to the United States and was admitted upon presentation of the same visa, which classified her as the minor, unmarried child of a lawful permanent resident and exempt from the labor certification requirement.

After becoming aware of petitioner's marital status, the Service instituted deportation proceedings on May 16, 1972 by the issuance of an order to show cause and notice of hearing. The order to show cause alleged that because petitioner had married prior to her admission to the United States, she was deportable under Section 241(a)(1) of the Act, 8 U.S.C. §1251(a)(1) as an alien excludable upon entry in that

> "At the time of your admission to the United States you were not in possession of a valid labor certification as required under the provisions of Section 212(a)(14) of the Immigration and Nationality Act and you were not exempt from that requirement."

During the course of the deportation hearings petitioner admitted the allegations in the order to show

cause relating to her alienage, entry and marriage. She denied those allegations which related to her failure to possess the required labor certification and contested deportability. The evidence adduced during the course of the deportation proceedings established that petitioner's visa does not contain any form advising her that she would lose her status as a "child" if she married prior to her application for admission to the United States. Petitioner testified that she had not been advised by the consul that marriage prior to admission would affect her immigration status. Petitioner's mother corroborated petitioner's testimony with respect to the consul's alleged failure to furnish advice with reference to petitioner's marital status.

The Immigration Judge denied petitioner's application to subpoena the United States Consul at Santo Domingo, Dominican Republic.

The Immigration Judge found petitioner deportable as charged and granted her the privilege of voluntary departure in lieu of deportation. He also

entered an alternate order of deportation to the Dominican Republic in the event petitioner did not depart voluntarily. Petitioner appealed the order of the Immigration Judge to the Board of Immigration Appeals. In a decision and order dated April 3, 1975 the Board dismissed the appeal. In so doing the Board held: (1) petitioner was not of the proper status under the quota specified in the visa at the time of entry into the United States; and (2) that even if the consul had failed to warn petitioner with respect to the effect of a marriage on her immigration status, this would not give rise to an estoppel against the government.

This petition for review followed.

RELEVANT STATUTES

Immigration and Nationality Act, Section 101 (8 U.S.C. §1101):

* * *

(b) As used in titles I and II -

(1) The term "child" means an unmarried person under twenty-one years of age* * *

Immigration and Nationality Act, Section 212 (8 U.S.C. §1182):

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * *
>
> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8).

RELEVANT REGULATION

22 C.F.R. §42.122 Validity of visas.

* * *

(d) The period of validity of a visa issued to an immigrant as a child shall not extend beyond the date on which the alien becomes 21 years of age. The consular officer shall warn an alien, when appropriate, that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission or if he fails to apply for admission at a port of entry into the United States before reaching the age of 21 years. The consular officer shall also warn an alien issued a visa as a first or second preference immigrant as an unmarried son or daughter of a citizen or lawful permanent resident of the United States that he will be inadmissible as such an immigrant if he is not unmarried at the time of application for admission into the United States.

ARGUMENT

POINT I

THE BOARD OF IMMIGRATION APPEALS PROPERLY FOUND PETITIONER TO BE DEPORTABLE UNDER SECTION 241(a)(1) OF THE ACT SINCE SHE LACKED A LABOR CERTIFICATION AND WAS NOT EXEMPT THEREFROM

Pursuant to Section 212(a)(14) of the Act, aliens seeking to enter the United States for the purpose of performing labor are excludable unless the Secretary of Labor has issued a certification that their employment

will not adversely affect employment conditions in the United States. There are several classes of aliens who are exempt from the labor certification requirement of Section 212(a)(14), including any "special immigrant" who is the "child" of a lawful permanent resident alien. A "special immigrant" is defined in Section 101(a)(27(A), 8 U.S.C. §1101(a)(27)(A), as an immigrant who was born in any independent foreign country of the Western Hemisphere. A "child" is defined by Section 101(b)(1) of the Act, 8 U.S.C. §1101(b)(1), as an unmarried person under the age of twenty-one years of age.

The petitioner was a "child" of a lawful resident alien at the time she applied for and received her immigrant visa. Since she qualified as a "child" she was exempt from the labor certification requirement. However, at the time petitioner entered the United States she was concededly not a child and, therefore, not exempt from the labor certification requirement of Section 212 (a)(14). Since she did not have the required labor certification and there is no evidence that she was

otherwise exempt therefrom, petitioner was excludable from the United States at the time she sought admission. Since she was excludable from the United States at the time of entry she is deportable under Section 241(a)(1) of the Act.

POINT II

THE IMMIGRATION AND NATURALIZATION SERVICE IS NOT ESTOPPED FROM ASSERTING PETITIONER'S EXCLUDABILITY AT ENTRY AS A BASIS FOR DEPORTATION

A. Warning required by 22 C.F.R. §42.122(d)

Petitioner does not contest the facts which rendered her excludable from the United States at entry and thus deportable under Section 241(a)(1). Rather, petitioner contends that the Service should be estopped from deporting her in view of the alleged failure of the consular officer who issued the visa to petitioner to warn her of the effect of marriage prior to entry to the United States. To support her contention, petitioner alleges that the United States consul at Santo Domingo

failed to comply with regulations of the Department of State. Specifically, petitioner contends that 22 C.F.R. §42.122(d) charges the consular officer abroad with the duty of advising marriageable age visa applicants that a marriage prior to entry into the United States would render the alien excludable from the United States. Petitioner argues that 22 C.F.R. §42.122(d) is the basis for the requirement that State Department Form FS-548, Statement of Marriageable Age Applicant, be executed by the alien in connection with the visa application.

It is submitted that petitioner's reliance on 22 C.F.R. §42.122(d) is entirely misplaced. That regulation relates to the warning to be given, in appropriate cases, and "a visa [has been] issued to an immigrant as a child . . ." Petitioner was not issued a visa based on her status as a "child" but was issued her visa based on her status as a "special immigrant."* A reading of 22 C.F.R. §42.122(d) clearly establishes

*Petitioner's visa contains the classification symbol SA-1 (T.). For the meaning of that symbol see 22 C.F.R. §42.12.

that the regulation relates only to warning an alien whose classification status is based on the fact that the alien qualifies as a child or an unmarried son or daughter under the first and second preferences set forth in Section 203(a)(1) and (2), 8 U.S.C. §1153(a)(1) and (2).

In addition there is no requirement in 22 C.F.R. §42.122(d) that State Department Form FS-548 be executed by any alien. In fact, there is no reference to FS-548 anywhere in the regulations relating to visa issuance. Nor is there any requirement in 22 C.F.R. §42.122(d) that the warning required by that regulation be in writing.

It is clear, therefore, that the consul was not under any affirmative duty "to have the alien sign a marital declaration." (Petitioner's brief, p. 7). Thus, petitioner's argument that the consul's failure to comply with the regulation by requiring her to sign the marital declaration/ constituted a denial of due process is utterly groundless.

B. <u>The doctrine of estoppel is unavailable to petitioner</u>.

The doctrine of estoppel is wholly inapplicable under the facts of the petitioner's case. Petitioner

cites several cases in support of her contention that the doctrine of estoppel is applicable to the Service. Whatever the rule of estoppel may be in immigration cases, it can only be invoked if the governmental conduct complained of amounts to "affirmative misconduct" as that term was used by the Supreme Court in United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973).

Hibi had sought naturalization in 1967 under §§701-05 of the Nationality Act of 1940 which provided for naturalization of non-citizens who had served honorably in the Armed Forces of the United States during World War II. Hibi, a native of the Philippines, was a member of this class but his 1967 petition did not meet the Act's requirements that all petitions be filed no later than December 31, 1946. He asserted estoppel against the Government based on the Government's "failure to advise him, during the time he was eligible, of his right to apply for naturalization, and from[INS's] failure to provide a naturalization representative in the Philippines during all of the time [Hibi] and those in his class were

eligible for naturalization." 414 U.S. at 7-8. The Supreme Court held estoppel to be unavailable against the Government on those facts, stating that:

> "While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in Montana v. Kennedy, 366 U.S. 308, 314, 315 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government." 414 U.S. at 8-9.

Thus, under the rule enunciated in Hibi it is clear that estoppel can only be available in the citizenship and immigration context where there has been "affirmative misconduct" on the part of the Government.

The complaint of the petitioner in this case is the alleged failure of the consul to inform. If that alleged failure is weighed against the failures in Hibi, the failure to inform petitioner of immigration requirements here does not appear to be more blameworthy than

the failure to "fully publicize" the citizenship rights of Filipino servicemen in Hibi. Moreover, the Government officials in Hibi acted in derogation of duty while no duty to inform has been established in this case. If there was governmental "misconduct" here it is of a less serious nature than that in Hibi.

Petitioner's brief completely ignores the Supreme Court's ruling in Hibi. Instead, petitioner cites several cases for the proposition that estoppel is available as against the Service (Point IV of petitioner's brief). We submit that the cases relied on by petitioner can be distinguished in each instance from this case. For example, Tejeda v. United States Immigration and Naturalization Service, 346 F.2d 389 (9th Cir. 1965), presents a classic example of official misconduct. That case involved misstatements made to an alien by an American consul concerning the expiration of the alien's statutory right to re-enter the United States. The alien, reasonably relying on the misstatements, was prevented from obtaining the necessary documentation to return to

the United States on a non-quota visa during the period when such admission was possible. The Court remanded the case for further hearing but, in a carefully limited decision, it held that petitioner would be eligible for relief if it were shown that he was actually and reasonably misled by the affirmative acts and misstatements of the American consul.

Similarly, Gestuvo v. District Director, 337 F. Supp. 1093 (C.D. Cal. 1971), on which petitioner also relies, involved "affirmative misconduct". Where the Service knew the facts concerning the alien's qualifications at the time it granted his petition for third preference classification and later sought to deport him after he had changed his position in justifiable reliance on such approval, it was held to be estopped from so doing. In citing the Gestuvo case, however, petitioner fails to refer to the subsequent reversal of the District Court by the Ninth Circuit and the remand of the case for reconsideration in light of the Supreme Court's ruling in the Hibi case. Santiago v. Immigration and Naturalization Service, F.2d , fn. 7 (9th Cir. 1975).

In the Santiago case, supra, the Ninth Circuit held estoppel to be unavailable in four cases in which an immigration officer had admitted an otherwise excludable alien. Each of the four petitioners in that case argued, inter alia, that the failure of the consular official who issued his visa to fully inform him of the immigration requirements upon which the validity of the visa depended. The Ninth Circuit, applying the "affirmative misconduct" rule enunciated in Hibi, held that when the particular facts in each of the petitioner's cases was weighed against the facts in Hibi, the failures were less blameworthy. The Court held, therefore, that estoppel against the Government was not available to the petitioners.

Demonstrably, there is no "affirmative misconduct" established by the record which would remove this case from the Hibi rule. Nor is there any claim made that the consul had knowledge of petitioner's intention to marry and deliberately failed to give the warning to

induce petitioner's misreliance to her prejudice. Accordingly, there is no factual basis for estoppel in the record before this Court.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 75-4096

Pauline P. ~~Trpxx~~ Troia being duly sworn, deposes and says that ~~s~~he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

20th day of February, 19 76 ~~s~~ he served ~~x~~ copys of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Antonio C. Martinez, Esq.,
324 West 14th St.
NY NY 10014

And deponent further says ~~s~~ he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

20th day of February, 19 76

Ralph L. Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977